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Reagan-Bush Computer Disks Must Be Saved, Court Rules

Decision Cites Importance of Electronic Records

By George Lardner Jr.
Washington Post Staff Writer

A federal appeals court yesterday spurned Clinton administration appeals and held that the government must preserve hundreds of thousands of White House computer messages and memos from the Reagan and Bush presidencies.

In a victory for historians and researchers, the three-judge panel unanimously rejected the government's contention that electronic materials do not have to be saved and that only paper printouts need to be kept under federal law.

Electronic materials and their paper versions cannot accurately be termed "copies" when frequently they are "only cousins—perhaps distant ones at that," the court said. Too much important information, such as who sent a document, who received it and when it was received can be gleaned only from the computer record, the judges emphasized.

The ruling affirms a January decision by U.S. District Judge Charles R. Richey, who ordered preservation of nearly 6,000 magnetic tapes and hard disks made at the White House in the Reagan and Bush administrations and held that White House plans to destroy most of them were unlawful.

The chief lawyer for the plaintiffs in the case, Michael Tankersley, called the ruling "a landmark victory" that will affect every government agency. Up to now, he said, very few have regarded their computer records as subject to the Federal Records Act and Freedom of Information Act (FOIA) requests.

Joining in the ruling were Chief Judge Abner J. Mikva and Judges Patricia M. Wald and Karen LeCraft Henderson of the U.S. Court of Appeals here. They also held that the judiciary has authority to review White House guidelines defining "presidential records" to make sure they "do not improperly sweep in non-presidential records."

The plaintiffs in the 4½-year-old case led by the nonprofit National Security Archive have been trying to obtain the "non-presidential" or "federal" records on the Bush and Reagan tapes, particularly those made at the National Security Council (NSC), even though they may be commingled with "presidential records" not subject to FOIA requests for up to 12 years after a president leaves office.

The appeals court said the importance of computer records has been demonstrated in recent years when they have been used by the Tower commission, congressional investigators and the independent counsel looking into the Iran-contra affair; by the Justice Department in connection with Panamanian leader Manuel Antonio Noriega's prosecution; and by NSC lawyers working on Robert M. Gates's confirmation as CIA director. "Our refusal to agree with the government that electronic records are merely 'extra copies' of the paper versions amounts to far more than judicial nitpicking," the court said. "Without the missing information, the paper printouts—akin to traditional memoranda with the 'to' and 'from' cut off and even the 'received' stamp pruned away—are dismembered documents indeed."

The court's ruling, which sends the case back to Richey for follow-up action, emphasized the primacy of a document's status as a "federal record" when it also might qualify as a "presidential record."

The distinctions can be tricky. A memo to President Clinton from his national security adviser about what to do in Bosnia-Herzegovina is a presidential record. But if the president signs it and it is then sent to the Pentagon to be implemented, it becomes a federal or agency record, subject to the Freedom of Information Act. The status of a document as an "agency" record, as the court put it yesterday, "trumps" its status as a presidential record.

"This ruling is a breakthrough for government accountability in the electronic age," said Tom Blanton, the National Security Archive's executive director. The group's founder, Scott Armstrong, said it also "sends a clear message" to the Clinton White House, which is still operating under Reagan- and Bush-era guidelines and which was held in civil contempt by Richey in May.

The appeals court yesterday vacated the contempt finding on grounds that Richey did not set a deadline for the administration to offer new guidelines. But it said Richey still can hold the government in contempt for failing to act quickly enough to preserve the Bush and Reagan tapes. Preservation copying of the oldest tapes did not begin until June 5.